

Bob Winick



The Maryland-National Capital Park and Planning Commission
8787 Georgia Avenue Silver Spring, Maryland 20910

Office of The General Counsel

Patricia M. Goldberg
Associate General Counsel

495-4646

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Attached is a copy of the Circuit Court's decision in *Schneider v. MNCPPC* and *Kettler v. MNCPPC* (the AGP challenge). Judge Miller decided this case in favor of the Commission upholding the denial of the two preliminary plans because of lack of capacity. Judge Miller also found the AGP to be a legitimate exercise of police power and constitutional in its enactment and administration.

COPY

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

IN THE MATTER OF
DR. JOHN E. SCHNEIDER

Civil No. 39760

BEFORE THE MONTGOMERY COUNTY
PLANNING BOARD
(PRELIMINARY PLAN NO. 1-83028)

* * * * *

DR. JOHN E. SCHNEIDER

Plaintiff

v.

Civil No. 41353

MONTGOMERY COUNTY, MARYLAND

and

MARYLAND-NATIONAL CAPITAL PARK
AND PLANNING COMMISSION

Defendants

* * * * *

IN THE MATTER OF KETTLER BROTHERS, INC.
WALKER'S RIDGE

Civil No. 49965

BEFORE THE MONTGOMERY COUNTY
PLANNING BOARD
(PRELIMINARY PLAN NO. 1-86204)

* * * * *

KETTLER BROTHERS, INC./
WALKER'S RIDGE

Plaintiff

Civil No. 51370

v.

MONTGOMERY COUNTY, MARYLAND
and
MARYLAND-NATIONAL CAPITAL PARK
AND PLANNING COMMISSION

Defendants

OPINION AND ORDER

INTRODUCTION

This case involves two administrative appeals from the decisions of the Maryland-National Capital Park and Planning Commission ("Commission") which disapproved preliminary plans of subdivision submitted by Appellants, Dr. John E. Schneider ("Schneider"), and Kettler Brothers, Inc./Walker's Ridge ("Kettler"). The disapproval of each plan was based on a finding by the Commission, that the public facilities, specifically transportation, were not adequate to support and service the areas of proposed subdivision, according to the Fiscal Year '89 Annual Growth Policy (FY '89 AGP) as adopted by the Montgomery County Council ("County"). Appellants contend that the FY '89 AGP is invalid as the commission acted beyond its police powers in enacting the AGP, it is unconstitutional, and has effected a taking of Appellants' property requiring payment of just compensation.

SCOPE OF REVIEW

In deciding these issues, this Court notes that judicial review of administrative action is a limited review. In recognition of the expertise of the Commission and the

presumed validity of administrative acts, this Court will not and cannot attempt to substitute its judgment for that of the Commission's. This Court will determine only whether the Commission acted lawfully and reasonably in adopting and implementing FY '89 AGP.

THE AGP

The County adopts an Annual Growth Policy (AGP) each year, which mandates standards by which the Commission is to determine, among other things, the adequacy of transportation facilities during the subdivision process.

The AGP divides the County into 246 statistical traffic zones and assembles these zones into several geographical Planning Policy Areas. These policy areas are given group classification numbers which reflect the availability of public transportation services to augment the roadway systems in the individual policy areas. It is the intent of the AGP that policy areas exhibiting similar public transportation availability be placed in the same group classification. Each group classification is assigned a Level of Service (LOS) rating which represents the maximum level of congestion which can be allowed over the whole policy area. LOS A is the lowest level of congestion; LOS F allows the highest level of

congestion. In general, the average level of service standards posted for each policy area are based on a theory that it is appropriate to permit greater congestion to occur in areas in which greater transit availability provides an alternative mode of travel for many travelers in that area.

Each policy area is also assigned a "staging ceiling," defined as the maximum amount of land development for which traffic can be accommodated by the roadway system, including existing and programmed facilities, without exceeding the LOS established for the group classification in which that policy area has been placed. Subtracting from this "staging ceiling" number all traffic in the "pipeline" (traffic from existing and previously approved but unbuilt subdivisions), a determination is made as to the amount of roadway capacity that remains for new development in the policy area before the assigned LOS is reached. When the "pipeline" number exceeds the "staging ceiling" number, the transportation facilities for that policy area are deemed to be inadequate and the preliminary plan is disapproved.

The staging ceiling for each policy area is further divided into two sub-ceilings, one for jobs (non-residential uses) and one for housing. Where sub-ceiling limitations are exceeded by the pipeline traffic, a moratorium is declared for subdivision applications proposing that type of use. It is

not uncommon for roadway system capacity to be adequate for one type of use and inadequate for another type.

In addition to the Policy Area Review, a Local Area Review is undertaken when a proposed subdivision would generate 50 or more peak hour (rush hour) automobile trips. The Local Area Review analyzes the level of traffic at intersections proximate to the proposed subdivision. The Planning Board is precluded from approving a subdivision plan if the AGP "peak hour" LOS capacity is exceeded at any such intersection.

THE SUBJECT PROPERTIES

The Schneider Property consists of 115.07 acres of undeveloped land in the Damascus Policy Area. Schneider's application for subdivision proposed 38 residential lots on that parcel. Kettler's application for subdivision proposed to create one lot of commercial office space on its 11.5 acres in the Gaithersburg East Policy Area. Both plans were disapproved upon the Planning Board's finding that according to the FY '89 AGP, there is no available transportation ceiling for new housing units in the Damascus Policy Area, or for jobs in the Gaithersburg East Policy Area.

APPELLANTS' CONTENTIONS

The Appellants challenge the Montgomery County National Park and Planning Commission's adoption of FY '89 AGP, contending that the Commission acted beyond its police powers; that the FY '89 AGP is unconstitutional; and that the FY '89 AGP effects a taking of Appellants' property entitling them to just compensation.

ARGUMENT

The Court rejects appellants contention that the County acted beyond its police powers in adopting and implementing the AGP. Appellants concede that the planning and zoning powers bestowed upon the County provide it with far-reaching authority to dictate where, when, why and how land within the County can be utilized, Art. 28, §7-101, et. sec., Annotated Code of Maryland, (1957, 1990 Repl. Vol.). However, appellants argue that the provisions of the AGP are unreasonable, and are not substantially related to the public health, morals, safety and welfare of the people; therefore, the County has exceeded the permissible bound of its police power. Appellants point out some "inconsistencies" in the AGP, to support this argument. However, a close look at these alleged inconsistencies defeats appellants' argument.

Appellants contend that it is unreasonable to deny Schneider's application for residential use when a proposed nonresidential use generating the same amount of traffic would have been approved. Likewise, Appellants claim it is unreasonable to reject Kettler's plan for a nonresidential building when a proposed residential use on that same property generating the same amount of traffic would be approved. While this may seem ironic, the AGP is a reasonable attempt by the County to balance the ratio of jobs (nonresidential) to housing (residential) in each policy area. By providing jobs for people who live in a given policy area, commuting distances are shortened, which in turn decreases traffic congestion. Therefore, allocating staging ceiling among jobs and housing better optimizes the usefulness of existing and programmed transportation facilities.

Appellants further suggest that no two group classifications have been given the same standard of adequacy of transportation indicating, they conclude, that the public health, safety and welfare was not a prominent factor in setting the standard. While Appellants' first statement is true, their conclusion does not follow. The public health, safety and welfare is better protected when different levels of service are set for different areas of the County. The fact that there are different levels of service for each

designated group is a function of the transit serviceability and availability, the types of roads which will be carrying the traffic, upstream and downstream traffic impacts and other factors. The public safety is served when certain areas of the County which may have greater transit availability and which provide an alternative mode of travel are permitted to have higher levels of congestion than the more rural areas of the County.

The second issue raised by Appellants is whether or not the different standards throughout the County violate due process and equal protection. Absent an infringement of a fundamental right or the creation of a suspect classification, the rational basis test is the proper standard of review for both substantive due process and equal protection challenges to government action. Appellants here, have the task of showing that there is no rational relationship between the protection of the health, safety and welfare of the community and the restrictions imposed by the AGP.

The Appellants contend that there is no nexus between the standards established for adequacy of transportation and the preservation of the public health, safety and welfare. The principal thrust of Appellants' constitutional challenge involves what they term the County's authority to create a multitude of definitions of the term "adequate" throughout the

County, and to further arbitrarily re-define that term within Group Classifications which are suppose to be similar.

Appellants suggest that if LOS C is adequate to protect the citizens of Damascus, how can the citizens of Bethesda be protected at LOS D/E? This argument fails to recognize the fundamental premise under which the AGP proceeds; that is, it is appropriate to permit greater congestion to occur in areas in which greater transit availability provides an alternative mode of travel in the area. The Level of Service designation includes a consideration of both road and transit options. Additionally, the Level of Service standards address the movement of people and vehicles among as well as within policy areas. Thus, the upstream and downstream effects of traffic from outside a policy area travelling through the area are factored into the equation as well. Therefore, LOS D/E in Bethesda is adequate because Bethesda has alternative modes of transportation such as metrorail and bus services providing travel alternatives. Whereas, Damascus has limited alternative service availability requiring the lower congestion level provided with LOS C restriction to assure the adequacy of transportation services. As alternative modes of travel become available, higher LOS ratings will be applied.

It is abundantly clear, as Appellants state, that if a law unjustly and materially discriminates among persons in

similar circumstances, then the law violates equal protection. However, the constitutions do not require classifications which are different in fact to be treated under the laws as though they are the same, Kelly v. Schoonfield, 193 Md. 627, 69 A.2d 471 (1949). The legislature may distinguish between sections of a governed area if there is enough of a "difference between the conditions in the territory selected and the conditions in the territory not affected by statute sufficient to afford some basis, however slight, for classification," Maryland Coal and Realty Co. v. Bureau of Mines, 193 Md. 627, 69 A.2d 471 (1949). It is Appellants' burden to show that the County's classifications and standards applied thereto are not reasonable. The Court finds that the Appellants have not met their burden. The provisions of the AGP are the result of a complex study of the affected areas, taking into consideration, among other things, the movement of people and vehicles among and within policy areas, the availability of roads and other transportation facilities to determine the amount of traffic congestion a given policy area will tolerate without sacrificing the health, safety and welfare of the people. Detailed considerations within a very diverse county underscore the reasonableness of the AGP standards.

Last, the Appellants contend that the provisions of the AGP which currently limit development of their properties constitutes a public taking obligating the County to pay just compensation under the 5th Amendment.

All parties cite Nollan v. California Coastal Commission, 483 U.S. 825 (1987) which provides guidance in analyzing the taking issue. Nollan requires that the regulation substantially advance the legitimate government interest sought to be achieved. Furthermore, there must be a direct nexus between the regulation and the substantial advancement of that government interest. Finally, while compensable takings can occur through government regulations upon the use of land, it must be decided whether the regulation in question "would interfere so drastically with [appellants'] use of their property as to constitute a taking," Nollan at _____.

The AGP is geared toward assuring that basic, necessary services such as transportation, sewer and water, and schools are adequately provided to preserve the health, safety and welfare of the County's population. Such an undertaking is of particular urgency in an area such as Montgomery County which has experienced tremendous population growth over the past decade. The AGP coordinates the timing of residential and commercial development with the building of the infrastructure services. The AGP does not stop growth, it merely suspends it

temporarily while the infrastructure services can catch up. While temporary restrictions on property can constitute a taking, a drastic interference with the use of Appellants' property must be shown. What constitutes a drastic interference with property use is determined by examining several factors including (1) the character of the governmental action, (2) the economic impact on the property owner, and (3) the extent to which regulation has interfered with reasonable investment-backed expectations. The mere fact that the regulation deprives the property owner of the most profitable use of his property is not necessarily enough to establish the owner's right to compensation, United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958).

Although no use permittable at this time maximizes profitability, there remain reasonable uses for both Appellants property. Dr. Schneider could build four houses on his property in conjunction with agricultural uses, essentially creating four "farmettes." The AGP permits the Kettler property to be developed commercially as mini-warehouses or storage facilities. While neither use maximizes the properties' potential uses, there remains reasonable use of both parcels. Furthermore, the AGP does not foreclose more intensive development in the future.

Appellants' object to there being no date certain upon which they will be able to proceed with their proposed

development. However, the practical realities of providing the necessary public facilities preclude the County from setting an exact date for completing the required infrastructure. Meanwhile, the Appellants retain meaningful and valuable property rights in their land. Additionally, the AGP contains a means for obtaining development approval by providing, at full or partial developer expense, necessary road, transit or ridesharing improvements. Neither Appellant sought to take advantage of this program.


The AGP substantially advances the County's interest in staging growth to coincide with transportation and other public services. In order to accomplish this the County must limit development in certain areas, including those properties owned by the Appellants. There is no taking because Appellants have a reasonable use for their properties at this time, and the prospect of more intensive use in the future.

For the foregoing reasons this Court upholds the validity of the AGP as adopted by the County and affirms the decisions of the Montgomery County Planning Board in denying Appellants proposals.

Accordingly, it is this 11th day of March, 1991, by the Circuit Court for Montgomery County, Maryland,

ORDERED that the decision of the Maryland-National Capital Park and Planning Commission disapproving the preliminary plans of subdivision submitted by Dr. John E. Schneider is affirmed; and it is further

ORDERED that the decision of the Maryland-National Capital Park and Planning Commission disapproving the preliminary plans of subdivision submitted by Kettler Brothers, Inc., is affirmed.



William C. Miller, Judge
Circuit Court for Montgomery
County, Maryland